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88-418

Supreme Court, U.S.
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CASE NO. A88-38
IN THE
SUPREME COURT OF THE UNITED STATES
1988 TERM

DEWEY D. SHANKS, GENEVIEVE M. SHANKS, JOSEPH C. SHANKS, and CAMILLE S. HARPER,

Petitioners,

v.

THE ESTES PARK BANK,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Colorado Supreme Court erred in refusing to grant certiorari and failing to correct the errors of the Colorado Court of Appeals.

2. Whether Petitioners were denied their constitutional rights to equal protection and due process of law by the numerous procedural and substantive errors of the trial court and the appellate courts.

3. Whether Petitioners were denied their constitutional right to a jury trial.

4. Whether the trial court erred in ruling, and the appellate courts erred in failing to correct such ruling, that Section 38-10-117 C.R.S. means that any conveyance done with an intent to defraud creditors is void and not voidable.

5. Whether the trial court erred in ruling, and the appellate courts erred in not

correcting such ruling, that the defenses of waiver and estoppel were not available against an allegation that a fraudulent conveyance had been committed.

6. Whether the trial court erred in refusing to instruct the jury on the issues of waiver and estoppel as possible defenses to an allegedly fraudulent conveyance, and in instructing the jury as it did as to what constitutes a fraudulent conveyance, and whether the appellate courts erred in failing to correct such errors.

7. Whether the trial court erred in dismissing the Defendants' counterclaims for lack of evidence, and whether the appellate courts erred in failing to correct such error.

8. Whether the trial court erred in refusing to allow into evidence further

testimony of the Defendants regarding their Small Business Administration Loan transactions with Plaintiff, and whether the appellate courts erred in failing to correct such error.

9. Whether the Colorado Court of Appeals erred in failing to address all issues presented in appeal, and the Colorado Supreme Court erred in failing to correct such error.

10. Whether the Colorado Court of Appeals erred in characterizing this matter as an equitable action wherein erroneous jury instructions are not prejudicial, and the Colorado Supreme Court erred in failing to correct such error.

11. Whether the Colorado Court of Appeals erred in implicitly holding that lack of consideration is the "sine qua non" of a

fraudulent conveyance, and the Colorado Supreme Court erred in failing to correct such error.

II. PARTIES

The petitioners, Dewey D. Shanks, Genevieve M. Shanks, Joseph C. Shanks and Camille S. Harper were the defendants in the trial court, the defendants - appellants in the Colorado Court of Appeals, and the petitioners in the Colorado Supreme Court. The respondent Estes Park Bank was the plaintiff in the trial court, the plaintiff -- appellee in the Colorado Court of Appeals, and the respondent in the Colorado Supreme Court. In addition in the trial court Dewey D. Shanks and Genevieve M. Shanks were third-party plaintiffs and Maurice O. Worley and Professional Real Estate Consultants, Inc., were third-party defendants. The latter two

parties were also appellees in the Colorado Court of Appeals, but were dismissed therefrom by stipulation and are no longer parties.

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IV. OPINIONS BELOW

1. Order of Colorado Supreme Court denying certiorari April 25, 1988, not published, Appendix p. A-1.

2. Opinion of Colorado Court of Appeals, October 8, 1987, not published, Appendix p. A-4.

3. Order and Judgment of District Court, June 10, 1983, Nunc Pro Tunc June 3, 1983, not published, Appendix p. A-6.

V. JURISDICTION

The decision sought to be reviewed was dated and entered on April 25, 1988. No rehearing was sought in the Colorado Supreme Court because the Colorado Rules of Appellate Procedure do not provide for rehearing of a decision by that court denying certiorari.

This Court entered its order on July 15, 1988, extending the time for filing this petition for writ of certiorari to and including August 22, 1988.

Jurisdiction is conferred on this Court to review the judgment in question by writ of certiorari by 28 U.S.C. Section 1257(3).

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Seventh Amendment:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the

laws.

Colorado Constitution

Article II, Section 25

Due process of law. No person shall be deprived of life, liberty or property, without due process of law.

Colorado Revised Statutes

38-10-117. **Conveyances to defraud creditors void.** Every conveyance or assignment in writing or otherwise of any estate or interest in lands, goods, or things in action or of any rents and profits issuing thereupon, and every charge upon lands, goods, or things in action or upon the rents and profits thereof made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suits commenced, or decree or judgment suffered

with the like intent as against the person so hindered, delayed, or defrauded shall be void.

38-10-120. **Intent, question of fact - want of consideration.** The question of fraudulent intent, in al cases arising under the provisions of this article, shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent against creditors or purchasers solely on the ground that it was not founded on a valuable consideration.

38-10-121. **Purchaser with notice of fraud.** The provisions of this article shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor or

of the fraud rendering void the title of such grantor.

Colorado Rules of Procedure

Colorado Appellate Rule 1 (a)(1):

(a) **Matters Reviewable.** An appeal to the appellate court may be taken from:

(1) A final judgment of any district, superior, probate, or juvenile court in all actions or special proceedings whether governed by these rules or by the statutes;

Colorado Rule of Civil Procedure 38:

(a) **Where Jury Right Exists.** Upon demand, in actions for the recovery of specific real or personal property, with or without damages or for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property, an issue of fact must be tried by a jury. However, after demand a jury trial may

be waived by stipulation of the parties.

(b) **Demand.** Any party may demand a trial by jury of any issue triable by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(c) **Same: Specification of Issues.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within ten days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all

of the issues of fact in the action.

(d) **Waiver.** The failure of a party to serve a demand as required by this Rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

VII. STATEMENT OF THE CASE

The Petitioners Dewey D. Shanks and Genevieve M. Shanks had had a banking relationship with the Respondent Estes Park Bank from 1952 up to the initiation of this litigation. They had entered into various personal and business loan transactions with the Estes Park Bank over the years and had relied upon business and financial advice from the Bank's President, George Hix. In 1977 Mr. and Mrs. Shanks obtained an SBA loan from the Bank for $75,000.00 for their

business, E-Z Lift, Ltd., a corporation they had formed for the sale of conversion kits that changed ordinary pick-ups to small dump trucks. During the application stage for this loan they informed the Bank's Mr. Hix that their personal residence would not be avaiable as collateral, but, at the time of loan closing the requirement appeared that they indeed had to pledge it. To do so they had to obtain permission from their adult children, Joseph C. Shanks and Camille S. Harper, the other Petitioners herein.

Because of this last-minute requirement, because the Estes Park Bank required the Shanks to use some of the SBA loan proceeds to pay off other loans instead of using them only for operating capital, and because at one point the Bank's Mr. Hix entered the Shanks' home, looked around and exclaimed "My, I could live here," causing Mrs. Shanks

to go into the bathroom and throw up (Trial Transcript Vol. V, p. 279 ll. 3-25, p. 357 l. 20, p. 358 l. 9) the Shanks determined to pay off this SBA loan early. They did so in the spring of 1978, six and one-third years before it was due.

In July 1978 the Shanks entered into a new loan transaction with the Bank. They executed a note for $100,000.00 and the only collateral required by the Bank was four commercial lots in the town of Estes Park, Colorado. This loan was for the purchase of such lots plus the payoff of some unsecured amounts due, and came due in January, 1979. The Shanks did not pay this note then and in March, 1979 the Bank commenced foreclosure proceedings against the four lots. On May 14, 1979, however, the parties restructured the loan. The Shanks paid the Bank $12,000.00, the Bank extended this

$100,000.00 to a new maturity date of May 14, 1980, and an additional note was executed by the Shanks to the Bank for $10,435.54 secured by a second deed of trust against the same four commercial lots. At the time of these May 14, 1979, transactions the Bank was aware that earlier that year, on February 9, 1979, Mr. and Mrs. Shanks had conveyed their residence to their children, Joseph C. Shanks and Camille S. Harper, reserving a life estate therein. Mr. Hix admitted that he was aware of such transfer within two weeks of its occurrence (Trial Transcript Vol. IV, p. 86, ll. 17-20) and that shortly after that time he told Mr. Shanks "I don't have any desire to have your home." (Trial Transcript Vol. IV, p. 88, ll. 10-11)

Subsequent to the May 14, 1979, transactions, the Shanks made plans for development of the lots. In early 1980 Mr.

Shanks formed a partnership with a Dr. Bohnsack and a Mr. Wheeler to do so, and they drew plans, began cost calculations and began working with propective tenants and contractors.

In May 1980 the two notes came due at the Bank but the lots had not been developed so they could not be paid then. The partners discussed the possible development and their ideas with the Bank. In August 1980 the Bank's Mr. Hix told Mr. Wheeler "...he would do nothing if Mr. Shanks would profit in any manner at all. He was not interested in cooperating on the land if he felt Mr. Shanks would benefit by it." (Trial Transscript Vol. IV, p. 221 l. 25 -- p. 222, l. 3)

On August 27, 1980, the Bank commenced foreclosure against the four lots. It obtained an appraisal dated September 4, 1980, valuing the Shanks' five lots

altogether at $2.50 per square foot for a total of $75,175.00, or approximately $15,000.00 per lot. (The Shanks owned a fifth adjacent lot that was not pledged to the Bank). At the foreclosure sale the Bank relied on this appraisal and bid $60,000.00 for the four lots, creating a deficiency claim on the notes against the Shanks of $73,323.01. No other bids were received and after expiration of the statutory redemption period the Bank took title to the lots.

The same appraiser, Maurice Wooley of Professional Real Estate Consultants, Inc., who provided this September 4, 1980, appraisal at $2.50 per square foot for the Bank, had appraised the same five lots together at $4.00 per square foot, or a total of $122,000.00 on May 4, 1979, and had also appraised the fifth lot by itself at $32,500.00 on April 30, 1979.

Because of the claimed deficiency the Bank initiated the instant litigation, filing its complaint in December 1980. (The complaint is at Appendix p. A-11). In its first claim for relief it sought a money judgment for the claimed deficiency. In its second claim for relief it sought to set aside the February 9, 1979, transfer by the Shanks of the remainder interest in their home to their children as a fraudulent conveyance.

In their Answer, Counterclaims, Jury Demand and Third Party Complaint, Appendix p. A-16) the Shanks generally denied the Bank's allegations and pleaded inter alia, duress, waiver and estoppel, and knowledge by the Bank that its bid was far below the actual value of the property. The Shanks also pleaded two counterclaims against the Bank. In the First they alleged the Bank breached

the SBA loan agreement between their controlled corporation, E-Z Lift, Ltd., and the Bank by improperly requiring use of some of such loan proceeds to repay other loans, causing damage to their business and credit, and further failing to show one such other loan as paid, causing damages. In the Second, they alleged they had taken out loans from the Bank in reliance on its financial representations and business advice and that the bank had induced them to take out such loans in order to eventually foreclose on the real property collateral, which was the commercial lots, that the Bank deliberately and negligently furnished information to third parties that prevented development of such lots, and that as a result of the Bank's interference with their business and breach of its fiduciary duty they suffered damages. Their jury demand was timely and unqualified.

Trial was to a jury of six. At the conclusion of Shank's case the Bank moved for dismissal of both counterclaims and for a directed verdict on its first claim for relief. The Trial Court denied the motion for directed verdict (Trial Transcript Vol. V., p. 389, ll. 4-9), but granted the motion to dismiss both of Shanks' counterclaims, finding there was no evidence of damages on the first (Trial Transcript Vol. VI, p. 397, ll. 8-14), and no evidence to support the second (Id., pp. 397-98).

Jury instructions were considered (Trial Transcript Vol. I, pp. 28-47; Vol. VI, pp. 399-401) and given to the jury. The Defendants tendered an instruction on their waiver and estoppel defense but it was refused by the Trial Court, which ruled that such defenses do not apply to a fraudulent

conveyance (Trial Transcript Vol. VI, pp. 399-400). The jury returned three verdicts: (1) that the Shanks transferred their home with an intent to hinder, delay or defraud the bank (Appendix p. A-8), (2) for the Third-Party Defendants and against the Shanks (Appendix p. A-10), and (3) a verdict for the Bank and against the Shanks for $96,440.85 (Appendix p. A-9). The Trial Court ordered judgment to enter accordingly. (Appendix p. A-6).

Defendants then appealed to the Colorado Court of Appeals. The issues perfected on appeal are set forth at (Appendix p. A-22). In their briefs therein the Shanks pointed out the trial court's errors in statutory interpretation and in depriving them of a jury decision on their counterclaims, and their denial of due process of law. The Colorado Court of Appeals rendered its

opinion on October 8, 1987, (Appendix p. A-4) affirming the trial court's decision without addressing many of the issues raised, and denied rehearing.

Application was made to the Colorado Supreme Court for review by way of Petition for Writ of Certiorari. Again therein errors of the lower courts in statutory interpretation were pointed out along with the effective deprivation of a jury trial, and the Court of Appeals' errors in relying on inapposite cases, failing to perform its duty to decide, and failing to follow applicable law as established by the higher court. The Petition for Writ of Certiorari to the Colorado Supreme Court was denied without opinion on April 25, 1988 (Appendix p. A-1).

Petitioners now seek review in this Court.

VIII - ARGUMENT

A. THE LOWER COURTS INCORRECTLY CONSTRUED SECTION 38-10-117 C.R.S. IN HOLDING THAT FRAUDULENT CONVEYANCES ARE VOID, IN CONFLICT WITH ESTABLISHED LAW THAT THEY ARE VOIDABLE, THUS DENYING PETITIONERS DUE PROCESS.

In the trial of this matter the construction of Section 38-10-117 C.R.S. was in issue. The trial court read the statute literally and ruled that since the term "void" was used therein, a fraudulent conveyance does not effectively transfer anything, and nothing that occurs thereafter could be considered to allow the transfer to stand. (Trial Transcript Vol. VI, p. 399 ll 2-9). This interpretation is contrary to the general rule that where "void" is used in such statutes it is construed to mean "voidable" (37 Am. Jur. 2d Fraud. Conveyances Section 106). This is also the law of Colorado by statute and decision. In Brooks v. Black, 22 Colo.App. 49, 123 P. 131

(1912) a husband-to-wife conveyance was determined to be fraudulent. However, the wife's later conveyance of the same property was upheld as passing good title. Such conclusion could not have been reached if the husband-to-wife transfer had been literally "void." Section 38-10-121 C.R.S. also clearly states such rule, that a bona fide purchaser can take good title regardless of the effect of 38-10-117 if it does not have notice of the fraudulent intent. The ruling of Brooks is still the law, cited for such purpose in In Re Smythe, 32 B.R. 736 (D. Colo 1983), citing for the same purpose Wright v. Yust, 118 Colo. 449, 195 P.2d 951 (1948).

The Court of Appeals herein ignored this statute and case law and did not address this statutory interpretation issue in any way. The case of Park State Bank v. Mclean, 660 P.2d 13 (Colo.App. 1982) it cited for

support addresses no elements of a fraudulent conveyance nor this question. Such error by the lower courts was a gross and obvious disregard of the applicable established case and statutory law. No rationale was provided; the ruling was completely arbitrary. Under such circumstances such mistaken unjustified deprivation of property violated the Due Process Clause of the Fifth and Fourteenth Amendments. Carey v. Piphus, 435 U. S. 247, 98 S.Ct. 1042 (1978). See, Roberts v. City of New York, 295 U. S. 264, 55 S.Ct. 689 (1935). And such error violated the due process provision of the Colorado Constitution, Article II, Section 25.

B. LACK OF CONSIDERATION BY ITSELF DOES NOT MAKE A CONVEYANCE FRAUDULENT, AND THE AUTHORITY RELIED UPON BY THE COURT OF APPEALS IS NOT DISPOSITIVE. THE JURY SHOULD HAVE BEEN INSTRUCTED ON ALL ELEMENTS OF A FRAUDULENT CONVEYANCE. THESE ERRORS DENIED PETITIONERS DUE PROCESS AND THEIR RIGHT TO A JURY TRIAL.

In its opinion, the Court of Appeals

concluded "the trial court did not err in holding that the conveyance was without consideration and in granting the relief sought by the plaintiff and in setting aside the transaction." It appears the affirmation of the trial court judgment was based on the fact the children did not give consideration in exchange for the remainder interest, as if lack of consideration by itself makes any transfer fraudulent. Such is clearly not the law, as set forth in Section 38-10-120 C.R.S., resulting in another arbitary decision denying due process. Carey v. Piphus, supra.

Further, whether a transfer is fraudulent also requires a determination whether the transferor is insolvent when it is made or becomes insolvent because it is made. Thuringer v. Trafton, 58 Colo. 250, 144 P. 866 (1944), Walton v. First National

Bank, 13 Colo. 265, 22 P. 440 (1889), Myers v. Hayden, 82 Colo. 98, 257 P. 35 (1927), Genova v. Champion, 33 B.R. 930 (Bkrtcy.D.Colo. 1983). In the instant case no such determination was made. And, there was sufficient evidence by which the jury could have determined the Shanks were solvent. Their financial statement of May 14, 1979, (Defendant's Trial Exhibit C, Record Vol. II, P. 28-29) showed a positive net worth of $218,783.46 excluding their residence. The valuation for their commercial real estate was supported by the April 30, 1979, appraisal they had obtained from Worley (Defendants' Exhibit 54, Vol. II, p. 42), valuing one lot at $32,500.00, so it was reasonable for them to conclude that the four adjacent similar lots pledged to the Bank were worth $130,000.00, adequately securing an indebtedness of $110,435.54.

Further, in 1978 they had paid off the SBA loan of $75,000.00 six and one-third years early, which is not the indication of an insolvent debtor. The Bank attacked the financial statement but at best, a conflict in evidence was created. The function of the jury is to resolve such conflicts and it should have been instructed regarding the solvency element. It was not, which effectively deprived Petitioners of their right to a jury trial under the Seventh Amendment and C.R.C.P. 38.

C. THE DEFENSES OF WAIVER AND ESTOPPEL ARE AVAILABLE AGAINST AN ALLEGEDLY FRAUDULENT CONVEYANCE, AND DENYING THEM FURTHER DENIED DUE PROCESS AND THE RIGHT TO A JURY DECISION.

The trial court ruled that waiver and estoppel were not allowable defenses (Trial Transcript Vol. VI, p. 399, ll. 9-13), contrary to Colorado and other law that clearly holds that when a creditor acquiesces in a sale that could have been deemed

fraudulent, or ratifies such a transaction, or changes its position after having knowledge of the transfer, that it is barred from later setting aside the transaction. Kinney v. Yoelin Bros. Mercantile Co., 76 Colo. 136, 230 P. 127 (1924), Sickman v. Abernathy, 14 Colo. 174, 23 P. 447 (1889), Seattle Lodge No. 211 ETC v. Par-T-Pak Beverage Co., 55 Wash.2d 587, 349 P.2d 229 (1960), Barretsville Bank & Trust Co. v. Bolton, 182 Tenn. 364, 187 S.W. 2d 306 (1945) (Bank president had constructive notice of transfer by recorded deed and actual notice 10 days later, found to have acquiesced in transfer and waived right), and Bollie v. Bethke, 71 N.D. 208, 299 N.W. 303 (1941).

In the instant case the Bank's President Hix told Mr. Shanks, within days after the allegedly fraudulent February 9, 1979, transfer, "I don't have any desire to

have your house." (Trial Transcript Vol. IV, p. 88, l. 10-11). Mr. Hix was a banker of many years of experience (Trial Transcript Vol. III, p. 23, l. 22--p. 24, l. 9) and by his own testimony had done real estate appraisals for the bank. (Trial Transcript Vol. IV, p. 77, l. 22--p. 78, l. 2). From this the jury could reasonably conclude that he knew what he was doing when he made such statement and was giving up any right he may have had to go after the residence. Further, with knowledge of the transfer, three months later, on May 14, 1979, the Bank accepted $12,000.00 from the Shanks, extended the $100,000.00 note for a year, and wrote a new note for $10,435.54. From this evidence a knowing waiver could reasonably be concluded to have occurred, and the jury should have been instructed on this issue. The Petitioners were not allowed to have their

peers determine this issue, however, since the court took it away from the jury.

D. THIS MATTER WAS A JURY CASE AB INITIO INVOLVING BOTH LEGAL AND EQUITABLE RELIEF, AND COMPLETE AND PROPER JURY INSTRUCTIONS WERE REQUIRED. THE FAILURE TO DO SO FURTHER DENIED DUE PROCESS AND THE RIGHT TO A JURY TRIAL.

The Court of Appeals relied on McKelvy v. Cooper, 165 Colo. 1102, 437 P.2d 346 (1968) in characterizing the instant case as an equitable action and in concluding that erroneous jury instructions are not prejudicial. McKelvy v. Cooper was a quiet title action tried to a court sitting with an admittedly advisory jury. To the contrary, the instant case was tried to a jury on all issues without objection by any of the parties or the trial court after an unqualified jury demand was made by Defendants in their initial pleading. The jury was not serving in an "advisory" capacity. Authority is well established that

"the trial of a non-jury action to a jury with the consent of both parties and the judge, is a jury trial in its regular sense." Young v. Colorado Nat'l Bank of Denver, 148 Colo. 104, 365 P.2d 701 (1961), Shuman v. Tuxhorn, 481 P.2d 741 (Colo.App. 1971), which was the case here. McKelvy is inapposite.

Further, the trial court was never requested to determine whether the nature of the case was legal or equitable because it was never an issue raised by the parties or the court. If the trial court had decided the nature of this case, it would have had to determine that the basic thrust was legal, (See Motz v. Jammaron, 676 P.2d 661 (Colo.App. 1973), since legal remedies predominated.

E. WHEN THERE IS SOME COMPETENT EVIDENCE TO SUPPORT ANY THEORY OF RELIEF, THE JURY IS TO BE INSTRUCTED THEREON AND THE FAILURE TO DO DO IS A FURTHER DEPRIVATION OF DUE PROCESS AND A JURY DECISION.

It is fundamental that when a trial court decides whether to take an issue away from the jury, all inferences must be drawn in favor of the nonmoving party. When there is some competent evidence to support any theory the jury is to be instructed thereon. Federal Ins. Co. v. Pub. Service Co., 194 Colo. 107, 570 P.2d 239 (1977). In the instant case the Shanks advanced two counterclaims but the trial court dismissed both even though all counterclaims were supported by at least some competent evidence. The interference with business claim was supported by the testimony of two non-party witnesses, Mr. Wheeler and Dr. Bohnsack. Mr. Wheeler testified that they formed a partnership with Mr. Shanks to develop the real estate of the Shanks pledged to the Bank, began pre-construction work (Trial Transcript Vol. IV, pp. 214-216,

221), and that in August, 1980, they met with the Bank's President Hix to present their plans. Mr. Hix responded that "...he would do nothing if Mr. Shanks would profit in any manner at all. He was not interested in cooperating on the land if he felt Mr. Shanks would benefit by it." (Id. p. 221, l. 25 -- p. 222, l. 3), and Mr. Hix described Mr. Shanks as a "disreputable operator." (Id. p. 222, l. 16). Mr. Wheeler further testified that "...as a result of this conversation the deal primarily fell apart." (Id, p. 22, ll. 19-20). Dr. Bohnsack testified that Mr. Hix "...insisted that Mr. Shanks was not to profit in any way..." (Id., p. 238, ll. 7-8) and that Mr. Hix said that Mr. Shanks was "...not to be involved in this in a profitable manner." (Id., ll. 1-2). The trial court determined that this testimony amounted to no evidence to support the

interference claim or rather, in taking the issue away from the jury, the trial court determined that it would be impossible for any reasonable person to find evidence of interference in these remarks. There was also evidence of damages from this interference since Mr. Worley testified that one developed lot would have been worth $32,500 (Id., p. 196, ll. 13-21 and Defendants' Exhibit 54, Vol. II, p. 35), but the Bank purchased the four lots involved for only $15,000.00 each when it foreclosed (Id., p. 54, ll. 17-19), therefore showing damages of $17,500 per lot or $70,000.00 total.

The Court of Appeals did not correct the plain error committed by the trial court by its dismissal of the counterclaims nor even address such issue. The Shanks were therefore denied their right to trial by jury and due process.

F. THE COURT OF APPEALS FAILURE TO CORRECT THE TRIAL COURT'S IMPROPER REFUSAL TO ADMIT CERTAIN EVIDENCE WAS A FURTHER DENIAL OF DUE PROCESS.

The trial court refused to admit evidence of the Bank's breach of the SBA loan agreement raised by the Shanks in their counterclaim, ruling that such cause of action belonged to E-Z Lift, Ltd., their corporation (Trial Transcript Vol. V, p. 271, ll. 14-23). This demonstrated the trial court's failure to perceive that the Shanks personally guaranteed the loan (Defendants' Exhibit F, Paragraph (l) (c), Vol. II, p. 34) and if the corporation failed to repay it they would be required to do so. The Bank knew the SBA loan could benefit them personally, and treated them and the corporation as one in combining the corporate and personal debt to put it over its lending limit (Trial Transcript Vol. V, p. 263, ll. 14-23). The Shanks were therefore third-

party beneficiaries of the loan agreement and could sue for its breach. Sanders v. Black, 136 Colo. 417, 318 P.2d 1100 (1957). Therefore evidence of damages caused the Shanks by breach of the SBA agreement was relevant and should have been admitted under Rule 402, Colo. Rules of Evidence. The Trial Court's refusal to admit such evidence was not based on a discretionary determination of relevance, but on the failure to preceive that the Shanks were real parties in interest that could be personally damaged, which issue was not corrected or even reviewed by the Court of Appeals.

G. THE FAILURE OF THE COURT OF APPEALS TO ADDRESS AND DECIDE ALL ISSUES RAISED ON APPEAL WAS A DENIAL OF EQUAL PROTECTION AND OF DUE PROCESS.

Under Colorado Appellate Rule 1 a party is entitled to appeal the judgment of a district court to the Court of Appeals. The Due Process Clause of the Fourteenth

Amendment does not require a State to provide appellate review but if a State does so it must be provided to all litigants equally. Otherwise the Equal Protection Clause is violated. Lindsey v. Normet, 405 U. S. 56, 92 S.Ct. 862 (1972). To arbitrarily decide some issues and ignore others would deny equal protection to the litigant raising those issues that were ignored. If judges fail to hear and decide a case, due process is denied. Atkins v. United States, 556 F.2d 1028 (Ct. of Cl., 1977), cert. denied, 434 U. S. 1009, and if an adverse decision is rendered there must be reasons given therefore by the State to meet due process requirements. Shamie v. City of Pontiac, 443 F.Supp 679 (E.D. Mich. 1977). The Court of Appeals decision herein is glaringly deficient in all of these respects. It fails to directly address any of the issues

appealed, which are set forth at Appendix p A-22. It merely states that the trial court did not err in setting aside the conveyance. If the Shanks had brought their counterclaims in a completely independent action where they were dismissed and an appeal taken, the Court of Appeals decision thereon would apparently have been a blank piece of paper, for that is the effect of their non-opinion herein on such issue. The issue in the Bank's favor was reviewed but not the issues in the Shanks' favor. This is a denial of equal protection and due process.

IX. CONCLUSION

The errors in this case build one upon another and their cumulative impact is to work a clear injustice. The failure by the trial court to properly interpret the fraudulent conveyance statute deprived the Shanks of their right to have the jury

determine their waiver defenses. The dismissal of their counterclaims was clearly contrary to all of the evidence in their favor, which again deprived them of a jury decision. The Court of Appeals relied on cases that were not remotely applicable and failed to review the substance of the issues appealed. The result in legal terms, if these errors are not corrected, will be a deprivation of property without due process of law and a denial of the equal protection of the law. The result in societal terms, if these errors are not corrected, will be a growing disrepect for the judicial system. An attorney will have to add a disclaimer to any advice he or she may give, i.e. "This is what will happen -- if the court decides to follow the law this day." When results lose any degree of predictability the fundamental fairness upon which our system of laws is

supposedly based is gone.

For these reasons the Petitioners pray that this Court grant certiorari so that this matter may be reviewed on the merits.

Respectfully submitted,

James B. Dunlap

James B. Dunlap
Attorney for Petitioners
9580 West 14th Avenue
Lakewood, Colorado 80215
PH: (303) 234-9673

X. CERTIFICATE OF SERVICE

The undersigned counsel of record for Petitioners herein and member of the Bar of this Court hereby certifies that three true and complete copies of this Petition for Writ of Certiorari have been served upon the Respondent herein by depositing same in the United States mail, proper first-class postage prepaid, addressed to Respondents' counsel as follows this 19th day of August, 1988:

Charles S. Bloom
WOOD, HERZOG, OSBORN & BLOOM, P.C.
No. 1 Old Town Square
P. O. Box 2003
Ft. Collins, Colorado 80522

James B. Dunlap

XI. APPENDIX Page

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SUPREME COURT, STATE OF COLORADO

Case No. 87SC468

Certiorari to the Colorado Court of Appeals

83CA1136

Larimer County District Court 80CV 1453

ORDER OF COURT

DEWEY D. SHANKS, GENEVIEVE M. SHANKS, JOSEPH C. SHANKS, and CAMILLE S. HARPER,

Petitioners,

v.

THE ESTES PARK BANK,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is DENIED.

BY THE COURT, EN BANC, APRIL 25, 1988.

cc: Gary Sonke, Clerk
Colorado Court of Appeals

James B. Dunlap
9580 West 14th Avenue
Lakewood, CO 80215

Wood, Herzog, Osborn & Bloom, P.C.
Charles S. Bloom
No. 1 Old Town Square
P.O. Box 2003
Fort Collins, CO 80522

Honorable Arnaud Newton
Larimer County District Court
Larimer County Courthouse
P.O. Box 2066
Fort Collins, CO 80522

THE COURT OF APPEALS OF THE STATE OF COLORADO

Case Number 83CA1136

THE ESTES PARK BANK a Colorado corporation, Plaintiff-Appellee, v. DEWEY D. SHANKS, GENEVIEVE M. SHANKS, JOSEPH C. SHANKS, and CAMILLE S. HARPER, Defendants-Appellants, and DEWEY D. SHANKS and GENEVIEVE M. SHANKS Third-Party Plaintiffs-Appellants.	ORDER

Upon consideration of the Petition for Rehearing filed by the Appellants herein, said Petition is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and

including 12-21-87, provided that if Petition of Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Sternberg, J.

Smith, J.

DATED: 11-19-87

Kelly, J.

COLORADO COURT OF APPEALS

No. 83CA1136

THE ESTES PARK BANK, a Colorado corporation, Plaintiff-Appellee,	)	
v.	)	NOT SELECTED FOR PUBLICATION
DEWEY D. SHANKS, GENEVIEVE M. SHANKS, Defendants-Appellants, and DEWEY D. SHANKS and GENEVIEVE M. SHANKS, Third-Party Plaintiffs-Appellents.	)	

Appeal from the District Court of Larimer County

Honorable Arnaud Newton, Judge

DIVISION II
Opinion by JUDGE STERNBERG
Smith and Kelly, JJ. concur

JUDGMENT AFFIRMED

Opinion filed and Judgment entered

Wood, Herzog, Osborn & Bloom, P.C.
Charles S. Bloom
Ft. Collins, Colorado

Attorneys for Plaintiff-Appellee

10-8-87.

James B. Dunlap
Lakewood, Colorado

Attorney for Defendants-Appellants
and Third-Party Plaintiffs-Appellants

This is an appeal of a judgment of the trial court holding void a conveyance of a residence from parents to their children reserving to the parents a life estate. The trial court did not err in holding that the conveyance was without consideration and in granting the relief sought by the plaintiff and in setting aside the transaction. See Park State Bank v. McLean, 660 P.2d 13 (Colo. App. 1982). We also conclude that even if, as defendants allege, certain jury instructions were erroneous, the error was not prejudicial in this, and equitable action. See McKelvy v. Cooper, 165 Colo. 102, 437 P.2d 346 (1968).

The judgment is affirmed.

JUDGE SMITH and JUDGE KELLY concur.

DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO

Case No. 80 CV 1453

ORDER AND JUDGMENT

THE ESTES PARK BANK, a Colorado corporation,

Plaintiff,

vs.

DEWEY D. SHANKS, GENEVIEVE M. SHANKS, JOSEPH C. SHANKS and CAMILLE S. HARPER,

Defendants.

THIS CAUSE, having come on for trial to a jury on the issue of whether the Defendants Dewey D. Shanks and Genevieve M. Shanks conveyed certain property to Joseph C. Shanks and Camille S. Harper, with an intent to hinder, delay or defraud creditors; and

All of the parties being represented in Court by counsel; and the property in question being Lot 7, Block 6, Lone Pine

Acres First Addition, which is also known as 1760 High Pine Drive, Estes Park, Larimer County, Colorado and

On June 3, 1983, the jury having answered a Special Verdict that such conveyance was accomplished with the intent to hinder, delay or defraud the Estes Park Bank as a creditor; and

The parties having agreed prior to the start of the trial that the matter was to be submitted to the jury, with the Court to enter an appropriate Order and Judgment based on the verdict of the jury.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the conveyance of February 9, 1979, of Lot 7, Block 6, Lone Pine Acres First Addition, also known as 1760 High Pine Drive, Estes Park, Larimer County, Colorado, as recorded in the books and records of Larimer County at Book 1928, Page 697, is hereby declared to have been void and such

conveyance is hereby set aside and held for naught.

Dated this 10th day of June, 1983, Nunc Pro Tunc June 3, 1983.

Arnaud Newton, Judge

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF LARIMER, STATE OF COLORADO

Civil Action No. 80CV1453

THE ESTES PARK BANK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	SPECIAL
	)	VERDICT
DEWEY SHANKS, GENEVIEVE	)	
	)	
SHANKS, JOSEPH SHANKS	)	
	)	
and CAMILLE HARPER,	)	
	)	
Defendants.	)	

QUESTION: Did the Defendants Dewey Shanks and Genevieve Shanks transfer their marital home to the Defendants Joseph Shanks and Camille Harper with an intent to hinder, delay or defraud The Estes Park Bank as a creditor? (Yes or No)

ANSWER: YES

[Signatures of jurors typed below]

Ruth F. Martin — Robert E. Drechsel [sp?]

Arlene Stewart — Given P. Lightsey

Elaine B. Scott — Melvin J. Veedluigu [sp?]

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF LARIMER, STATE OF COLORADO

ESTES PARK BANK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	VERDICT
DEWEY SHANKS, GENEVIEVE	)	
	)	
SHANKS, JOSEPH SHANKS	)	
	)	
and CAMILLE HARPER,	)	
	)	
Defendants.	)	

We, the jury, find for the Plaintiff, The Estes Park Bank, and award damages of $96,440.85 against the Defendants, Dewey Shanks and Genevieve Shanks.

[Signatures of jurors typed below]

Ruth F. Martin	Robert E. Drechsel [sp?]
Arlene Stewart	Given P. Lightsey
Elaine B. Scott	Melvin J. Veedluigu [sp?]

DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO

Case No. 80 CV 1453

VERDICT FOR THIRD-PARTY DEFENDANTS

THE ESTES PARK BANK, a Colorado banking corporation,

Plaintiff,

vs.

DEWEY D. SHANKS, et al.,

Defendants.

DEWEY D. SHANKS, et al.,

Third-Party Plaintiffs,

vs.

MAURICE C. WORLEY, et al.,

Third-Party Defendants.

We, the jury, find for the Third-Party Defendant, Maurice Worley and Professional Real Estate Consultants, Inc., and against the Third-Party Plaintiff, Dewey and

Genevieve Shanks.

[Signatures of jurors typed below]

Ruth F. Martin	Robert E. Drechsel [sp?]
Arlene Stewart	Given P. Lightsey
Elaine B. Scott	Melvin J. Veedluigu [sp?]

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF LARIMER

STATE OF COLORADO

Division I

Civil Action No.: 80CV1453

THE ESTES PARK BANK, a Colorado banking corporation, Plaintiff, vs. DEWEY D. SHANKS, GENEVIEVE M. SHANKS, JOSEPH C. SHANKS and CAMILLE S. HARPER, Defendants.	COMPLAINT (On Promissory Notes and to Set Aside Fraudulent Conveyances and for Exemplary Damages)

FIRST CLAIM

Plaintiff by and through its attorney complains against the Defendant, Dewey D. Shanks and Genevieve M. Shanks, and states:

1. Plaintiff is a banking corporation orgainized and existing under and by virtue of the laws of the State of Colorado, with its principal office and place of business in

Estes Park, Larimer County, Colorado.

2. On July 28, 1978 and May 14, 1979, Defendants, Dewey D. Shanks and Genevieve M. Shanks, executed and delivered to Plaintiff their promissory notes hereinafter described and attached hereto as Exhibits "A" and "B" respectively:

a) One in the principal amount of $100,000.00 with interest at the rate of 12% per annum, secured by a Deed of Trust on certain vacant land of said Defendants in Larimer County, which note was originally payable January 24, 1979, but extended to May 14, 1980 by agreement of the parties.

b) One in the principal amount of $10,439.54 with interest at the rate of 12% per annum, payable on or before May 14, 1980, secured by a second lien Deed of Trust on the same vacant land of Defendants Dewey and Genevieve Shanks.

3. Said Defendants were in default on

the notes and Plaintiff duly foreclosed on and purchased the securing property at Public Trustee's Sale on October 15, 1980 with a bid of $60,000.00.

4. After deduction of costs of sale, the proceeds were applied to the sums due on the notes leaving a deficiency balance of $73,323.01 owing to Plaintiff by Defendants Dewey and Genevieve Shanks, which deficiency said Defendants have failed and refused to pay though demand was made.

5. By terms of the said notes, said Defendants are liable for Plaintiff's attorney fees and costs incurred in this action not to exceed 15% of the debt owing and interest on the deficiency from October 15, 1980 to date of judgment at the rate of 12% per annum.

WHEREFORE, Plaintiff demands judgment in its favor and against Defendants, Dewey D. Shanks and Genevieve M. Shanks, and each of

them, in the amount of $73,323.01 on the deficiency, plus reasonable attorney fees and costs of this action, interest on the deficiency at 12% per annum to date of judgment, interest thereafter as provided by law, and for such other and further relief as the Court deems just and proper.

SECOND CLAIM

For its Second Claim, Plaintiff complains against the Defendants and states:

6. Plaintiff incorporates all of the allegations of its First Claim by this reference.

7. Said notes evidence obligations of Defendants Dewey and Genevieve Shanks to repay loans originally made to them by Plaintiff prior to February 9, 1979.

8. At the time credit was extended and said loans were made by Plaintiff to said Defendants, said Defendants owned and occupied as their place of residence certain

real property in Larimer County, Colorado, more particularly described as:

LOT 7, BLOCK 6, LONE PINE ACRES FIRST ADDITION in the Town of Estes Park, County of Larimer, State of Colorado.

9. On February 9, 1979, said Defendants Dewey and Genevieve Shanks executed a Warranty Deed purporting to convey said property to Defendants Joseph C. Shanks and Camille S. Harper, which Deed was recorded February 9, 1979, in Book 1928 at Page 697 in the Larimer County records.

10. Defendants Joseph C. Shanks and Camille S. Harper, the grantees named in said Deed, are children of Defendants Dewey and Genevieve Shanks.

11. Defendants Dewey and Genevieve Shanks received no consideration of monetary value in exchange for the conveyance of said property by them.

12. Subsequent to February 9, 1979,

Defendants Dewey and Genevieve Shanks have continued to occupy said property as their place of residence and, on information and belief, have continued to pay the taxes assessed against said property from and after the purported conveyance.

13. As a result of the conveyance heretofore described, Defendants Dewey and Genevieve Shanks were rendered insolvent.

14. Said conveyance was made by Defendant Dewey and Genevieve Shanks with the intent to hinder, delay and defraud Plaintiff in its collection of the indebtedness due from said Defendants, to Plaintiff's damage in the amount of the deficiency heretofore described.

15. The purported conveyance described herein is, therefore, void as against Plaintiff and should be set aside.

16. Plaintiff's damage were attended by circumstances of fraud or a wanton or

reckless disregard of the Plaintiff's rights and feelings and exemplary damages of $70,000.00 should be assessed against Defendants Genevieve and Dewey Shanks and awarded to Plaintiff.

WHEREFORE, Plaintiff prays for judgment as follows:

A. For a determination by the Court that Defendants Joseph C. Shanks and Camille S. Harper have no rightful interest or ownership rights in the above described property and an Order setting said conveyance aside and rendering it void and of no effect.

B. For judgment in favor of Plaintiff and against Defendants Dewey D. Shanks and Genevieve M. Shanks for the damages suffered by Plaintiff of $73,323.01, plus exemplary damages of $70,000.00, reasonable attorney fees and costs of this action, interest as provided by law, and for such other and further relief as the Court deems just and

proper.

DATED this 5th day of December, 1980.

WOOD, HERZOG, OSBORN & BLOOM, P.C.

[Signed]

C. William Herzog, No. 2020
Attorney for Plaintiff
217 West Olive, P.O. Box 2003
Fort Collins, Colorado 80522
484-2928

Address of Plaintiff:

P.O. Box 2270
Estes Park, Colorado 80517

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF LARIMER

STATE OF COLORADO

Civil Action No.: 80CV1453

THE ESTES PARK BANK, a Colorado banking corporation, Plaintiff, vs. DEWEY D. SHANKS, GENEVIEVE M. SHANKS, JOSEPH C. SHANKS and CAMILLE S. HARPER, Defendants.	ANSWER, COUNTER-CLAIMS, JURY DEMAND AND THIRD PARTY COMPLAINT

COMES NOW the Defendants, by Herbert A. Shatz, their attorney, and as and for an Answer to the Complaint, respectfully states as follows:

1. Denies each and every allegations set forth in paragraph 3, except admits the foreclosure.

2. Denies each and every allegation set forth in paragraphs 4, 5, 6, 7, 8, 9, 11, 12,

13, 14, 15, and 16.

AFFIRMATIVE DEFENSES

1. That the Complaint does not set forth grounds upon which relief can be granted.

2. Duress.

3. Waiver and estoppel.

4. Knowledge of the fact of conveyance to defendants Joseph C. Shanks and Camille S. Harper, and that no contrary information was furnished to plaintiff.

5. That the real property described in the Complaint was bid in at a price below the actual value of the said property, and that the Plaintiff knew the actual value of said property, and that same was in excess of the bid price and/or the true value.

6. All matters set forth in the Counterclaims hereinafter pleaded.

COMES NOW, Defendants Dewey D. Shanks and Genevieve M. Shanks, and as and for a

First Counterclaim, alleges:

1. That the defendants herein are owners and control E-Z Lift, Ltd., and on or about May 26, 1977, the plaintiff was a guaranteed lender from the United States Small Business Administration, and loaned to E-Z Lift Ltd. the sum of $75,000.00, which was guaranteed by the United States Small Business Administration in the amount of 90%, and these defendants personally. Loan No. CP-862,195-10-09 Den.

2. That pursuant to the terms of such loan and authority of the Small Business Administration, $15,000.00 was to be applied for working capital and $60,000.00 for inventory.

3. That at the time of the said loan, these defendants had a personal and outstanding loan at plaintiff's bank in the sum of $6,000.00.

4. That in breach of the Small Business

Administration agreement between plaintiff and these defendants, the plaintiff improperly and in violation of said agreement, caused a withdrawal of the said $6,000.00 plus other unauthorized sums from the proceeds of said loan guaranteed by the Small Business Administration, on June 1, 1977.

5. That the taking of such monies by the plaintiff was deliberate and malicious, and without authority, or right.

6. That as a result of same, these defendants sustained direct and consequential damage to their business and credit in the sum of $50,000.00.

7. That in addition to the withdrawal to itself of said $6,000.00, plus other unauthorized sums, the plaintiff continued to maintain the said $6,000.00 was unpaid, and did so until September 1, 1977. That until such time, and despite the improper

withdrawal, the defendants credit for such period indicated an outstanding delinquency.

8. That these defendants in addition seek exemplary damages in the sum of $50,000.00, in that plaintiff consciously and maliciously and deliberately in violation of the said agreement and banking regulations, made payment as aforesaid; and these defendants seek exemplary damages in the sum of $50,000.00.

WHEREFORE, on the First Counterclaim, these defendants pray for judgment in the sum of $50,000.00, plus $50,000.00 in exemplary damages, and for such other and further relief as to the Court may be just and proper, with costs, interest, attorney fees, and disbursements.

Second Counterclaim by Dewey D. Shanks and Genevieve M. Shanks:

9. That over a long period of time, the said defendants have dealt with the

plaintiff, in making loans, having checking accounts, and in receiving business and financial advice.

10. That on February 17, 1978, the plaintiff advised these defendants that their loans and credit were substanded, allegedly according to bank examination.

11. That thereafter, and in July, 1978 and in May, 1979, the plaintiff bank made the loans to the defendants that are the subject matter of the Complaint.

12. That the defendants were advised by the plaintiff that the said loans were substantially in excess of the needed collateral.

13. That the value of the lots taken and security were in fact worth in excess of $150,000.00, and that the plaintiff was advised by the defendants that the lots being used as security were purchased for development purposes.

14. That the loans made by the plaintiffs, and in inducing defendants to make such loans, were made on the financial representations and business advice of the plaintiff to these defendants.

15. That the plaintiff in inducing these defendants to make said loans were adopting a course of action to eventually permit the plaintiff to foreclose the loans, and the plaintiff knew that without the plaintiff's cooperation as a bank in assisting these defendants with guidance, advice, knowledge, and financing, the defendants could not repay the loans.

16. That thereafter these defendants made every effort to pay off the loans, by arranging development of the projects as to the property being foreclosed by the plaintiffs, and in seeking additional and other financing, but the plaintiff negligently and deliberately furnished

information to third parties that prevented development of the lots, and lead to the foreclosure of same at a price substantially below market value.

17. That the actions by the plaintiff constituted a breach of plaintiff's fiduciary and other relationships with these defendants, and also constituted an interference with the defendants' business and credits.

18. That as a result of same, these defendants have sustained damages, loss of credit and reputation, among other things, in the sum of $500,000.00.

19. That these defendants in addition seek exemplary damages in the sum of $500,000.00 in that plaintiff's action was of a character and nature, and in breach of fiduciary and other obligations, that exemplary damages should be awarded.

WHEREFORE, on the Second Counterclaim,

these defendants pray for judgment in the sum of $500,000.00, plus $500,000.00 in exemplary damages, and for such other and further relief as to the Court may be just and proper, with costs, interest, attorney fees, and disbursements.

[Signed]

Herbert A. Shatz 2880
Attorney for Defendants
201 Guaranty Bank Bldg.
Denver, Colorado 80202
825-7247

Address of Defendants:

Dewey D. Shanks and Genevieve M. Shanks, Box 1499, Estes Park, Colorado 80517

Joseph C. Shanks, 1206 Court Place, Colby, Kansas 66701

Camille S. Harper
5151 Greenberry Drive,
Sacramento, California 95841

DEFENDANTS REQUEST TRIAL BY JURY OF SIX

Issues Presented for Review

1. Whether the Trial Court erred in its ruling that Section 38-10-117 C.R.S. means that any conveyance done with an intent to defraud creditors is void and not voidable.

2. Whether the Trial Court erred in ruling that the Defenses of waiver and estoppel were not available against an allegation that a fraudulent conveyance had been committed.

3. Whether the Trial Court erred in refusing to instruct the jury on the issues of waiver and estoppel as possible defenses of Defendants, and in instructing the jury as it did as to what constitutes a fraudulent conveyance.

4. Whether the Trial Court erred in dismissing the Defendants' counterclaims for lack of evidence.

5. Whether the Trial Court erred in refusing to allow into evidence further

testimony of the Defendants regarding their Small Business Administration Loan transactions with Plaintiff.

6. Whether the bankruptcy proceedings by Dewey and Genevieve Shanks in the interim between the trial of this matter and the eventual decision by this Court of Appeals bars any further action by the Plaintiff bank.